No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

YONG HO AHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. Can a guilty plea be knowing and voluntary where the prosecutor, defense counsel and the trial court all have an explicit misunderstanding about the crime's elements (as became clear through a later decision of this Court) and as a result, the defendant is specifically misinformed about what the elements mean at the time of the plea?

II. Can reading the language of a criminal statute during a plea hearing, and having the defendant admit to violating its terms, be sufficient to support a guilty plea where the meaning of those terms is explicitly though innocently misrepresented by the prosecutor and by defense counsel?

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The petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. A) is reported at 231 F.3d 26 (D.C. Cir. 2000). The district court opinion is unreported. The district court's oral ruling is attached as App. B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on November 14, 2000. App. A. The Court of Appeals entered an order denying a timely petition for rehearing en banc on January 11, 2001. App. C.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution. The Fifth Amendment states, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The case also involves Title 18, U.S.C. Section 201(c)(1)(B), which states:

> Whoever . . . otherwise than as provided by law for the proper discharge of official duty . . . being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such public official or person . . . shall be fined under this title or imprisoned not more than two years, or both.

This case also involves Rule 11(c), Federal Rules of Criminal Procedure. In pertinent part, Rule 11(c) states:

> Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following, . . . the nature of the charge to which the plea is offered . . . .

STATEMENT OF THE CASE

The petitioner, the highest ranking Korean-American police officer in the nation, entered a plea of guilty to an Information charging one count of accepting an illegal gratuity in violation of Title 18, U.S.C. Section 201(c)(1)(B). It was alleged that the petitioner had accepted money from the operators of two spas after informing them that they were not properly licensed.

At Ahn's plea, the Government filed a "Factual Proffer" which set out that in early September, 1997, the defendant, who was described as a Lieutenant with the

Metropolitan Police Department, entered a massage spa and spoke to a cooperating witness, telling her that the spa was not properly licensed. The proffer went on to state that on September 3, 1997, the witness made cash payments of $1,000 and $1,500 to Ahn. On November 11, 1997, the witness made a third payment to Ahn of $500, and on November 21, 1997, she made yet another payment of $1,500. It was further alleged that in early December, 1997, Ahn entered another spa and told a second witness that the spa was not properly licensed. On December 23, 1997, that witness gave Ahn $3,000 in cash, and made a further payment on January 15, 1999 of $2,000.

The attorney for the government reviewed the factual proffer for the court orally, then added:

> MR. CHAPMAN: I would further proffer to the Court that [defense counsel] and I have had a number of discussions about the illegal gratuity and bribery statute. And we have discussed that under certain interpretations, ***it is unnecessary to show the payments were earmarked for a particular purpose, but rather payments can be made to an individual because of his capacity or his particular status within the Government.*** That concludes the Government's proffer at this time, Your Honor.
>
> THE COURT: All right. And the type of illegal gratuity is being used by the Independent Counsel in various actions, the HUD cases has a lot of illegal gratuity, not a lot of action like the Espy case, but it favored them in anticipation.

> MR. CHAPMAN: Yes. Certainly in this case ***the Government*** has discussed with counsel ***is not charging Mr. Ahn with a quid pro quo, but more of a theory of his job.*** (Emphasis added).

231 F.3d at 34; App. 11.

Ahn's guilty plea came ten days before the United States Court of Appeals for the District of Columbia Circuit issued its decision in *United States v. Sun-Diamond Growers of California*, 138 F.3d 961 (D.C. Cir. 1998), reversing a gratuity conviction, and one year before this Court handed down its decision affirming that reversal. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999). *Sun-Diamond* changed the understanding of the gratuity statute, making clear that in order to prove a violation, the government was required to prove "a direct link between the thing of value conferred upon a public official and a specific 'official act' for or because of which it was given", 526 U.S. at 414. "The insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved." *Id.* at 406.

Based upon *Sun Diamond,* and the comments of the prosecutor and his own misunderstanding of the elements of the gratuity statute, the petitioner filed a motion to withdraw his guilty plea based upon a change in the law. The district court denied that motion, and its decision was upheld by the Court of Appeals.

The Court of Appeals conceded that "it appears possible" that the prosecutor and defense counsel agreed that the Government only needed to establish that Ahn received payments as a police officer. 231 F.3d at 34; App. 12. The court also noted that "it is plausible" to read the theory of the job statement as meaning that Ahn was charged merely because of his position. *Id.* Nevertheless, relying on the fact that the court read the statute to Ahn and Ahn acknowledged

that he understood the statute and was guilty of its terms, it ultimately concluded that a "reasonable person" would have believed that Ahn understood the nature of the charges against him. 231 F.3d at 35; App. 12.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CONFLICTS WITH DECISIONS OF THE SUPREME COURT.

The decision in this case is a rejection of this Court's holding that a defendant must be given real notice of the true nature of the charge against him. In direct contravention of *Henderson v. Morgan*, 426 U.S. 637,645(1976), *McCarthy v. United States*, 394 U.S. 459 (1969), and *Bousley v. United States*, 523 U.S. 614, 619 (1998) the United States Court of Appeals for the District of Columbia Circuit has now held that where a defendant is affirmatively misinformed about the proof required under a criminal statute, his plea is nevertheless voluntary.

In *Henderson v. Morgan*, this Court declared that a plea could not be considered voluntary "unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process,'" citing *Smith v. O'Grady*, 312 U.S. 329, 334 (1941). Earlier, by unanimous decision in *McCarthy v. United States*, this Court held that, "because a guilty plea is an admission of all the elements of a formal criminal charge, *it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.*" 394 U.S. at 466. [emphasis added]. And recently, in *Bousley v. United States*, this Court noted that where "neither [the petitioner], nor his counsel, nor the court correctly understood the essential elements of the crime with which he

was charged . . . . petitioner's plea would be . . . constitutionally invalid." 523 U.S. at 618.

The defendant in *McCarthy* had pleaded guilty to attempting to evade payment of income taxes. At his plea, counsel informed the court that he had explained the nature of the charges to the defendant, and there was evidence that the defendant owed the government back taxes. The defendant later claimed that his plea was made without a full understanding of the charge, and in violation of Rule 11, F.R.Crim.P. Noting that at his sentencing hearing, the defendant claimed that his acts had not been intentional, as required by the statute, but merely "inadvertent" and "neglectful", the Court reversed the judgment of the Court of Appeals:

> Despite petitioner's inability to convince the court below that he did not fully understand the charge against him, it is certainly conceivable that he may have intended to acknowledge only that he in fact owed the Government the money it claimed without necessarily admitting that he committed the crime charged; for that crime requires the very type of specific intent that he repeatedly disavowed [at his sentencing hearing]. [Citations omitted]. Moreover, since the elements of the offense were not explained to petitioner, and since the specific acts of tax evasion do not appear of record, it is also possible that if petitioner had been adequately informed he would have concluded that he was actually guilty of one of two closely related lesser included offenses, which are mere misdemeanors.

394 U.S. at 470-71.

Ahn was clearly misinformed, by the prosecutor and apparently by his own counsel [1], about what was required for conviction in his case. At his plea hearing, the petitioner listened as the United States Attorney informed the court that in his many meetings with defense counsel, they had discussed "*it is unnecessary to show the payments were earmarked for a particular purpose, but rather payments can be made to an individual because of his capacity or his particular status within the Government.*" He listened as the prosecutor told the court, "*in this case the Government has discussed with counsel is not charging Mr. Ahn with a quid pro quo, but more of a theory of his job.*" As we now know, to be guilty of a gratuity violation, the government must indeed prove that the payments were made for a particular purpose, not because of an individual's public status or a theory of his job. *Sun-Diamond Growers.* Ahn was therefore misinformed about the "true nature of the charge against him".

Courts routinely void guilty pleas where there the defendant has been confused or has misapprehended the nature of the charge to which he has pleaded guilty. *Bousley* is a particularly apt example, where this Court held that where neither the court, nor counsel, nor the defendant understood the elements of the offense (as later interpreted in *Bailey v. United States,* 516 U.S. 137 (1995), decided after

[1] In Henderson, this Court noted that "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. 426 U.S. at 647.

his guilty plea), the defendant's plea could not be considered intelligently made.[2]

What happened here is far more egregious than what happened in the above-cited cases. From the record, it appears that the petitioner did not merely fail to comprehend a correct statement of the law, he was presented an *incorrect* statement of the law. He pleaded guilty because he believed it was sufficient under the gratuity statute merely to show that he was a police officer and that he took money. That was incorrect, as it turns out. The petitioner was entitled to "real notice of the true nature of the charge against him," *Henderson v. Morgan*, 426 U.S. 637, 645 (1976), by which is meant notice sufficient to give the defendant "an understanding of the law in relation to the facts of his case." *McCarthy v. United States*, 394 U.S. at 466.

Because it is abundantly clear after *Sun-Diamond* that Ahn misapprehended the charge (as did the prosecutor, the court and defense counsel), he should have been allowed to withdraw his plea.

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[2]See also, for example, *United States v. Gandia-Maysonet*, 227 F.3d 1 (1st Cir. 2000) (vacating guilty plea because of misunderstanding of necessary scienter element); *United States v. DeWalt*, 92 F.3d 1209, 1212 (D.C. Cir. 1996) (court failed to mention that defendant was pleading guilty to firearm charge); *United States v. Alihernandez-Wilson*, 186 F.3d 1 (1st Cir. 1999) (mistaken belief held by court, prosecutor and defense counsel at time of plea that defendant was eligible for safety valve held to make plea involuntary); *United States v. Fernandez*, 205 F.3d 1020 (7th Cir. 1999) (despite being questioned by trial court about whether he read and understood the indictment, and despite factual proffer by the U.S. Attorney defendant not fully aware of the nature of the crime to which he pleaded guilty; plea invalidated); *United States v. Young*, 424 F.2d 1276 (3rd Cir. 1970). In *Young*, the defendant pleaded guilty to bank robbery despite telling the plea judge that he did not understand the terms "force and violence". He later claimed that he understood the judge to explain that he was guilty merely because he was at the bank, whether or not he intended to commit the crime. The Third Circuit allowed him to withdraw his plea based on his misunderstanding of the law.

II. THE QUESTIONS PRESENTED ARE IMPORTANT.

This Court should act to correct what happened here because the rationale employed by the Court of Appeals is misplaced in a case like this. Where a defendant has been incorrectly advised about the legal meaning of a criminal statute, the fact that the court read him the terms of the statute, and the fact that the defendant says he knows what he is being charged with, is simply not enough to establish voluntariness.

The Court of Appeals' approach is deceptively appealing and could well lead other courts to make the same mistake. Despite claiming otherwise, the Court of Appeals used a mechanistic approach to evaluate Ahn's claim that his plea was not voluntary or intelligent, one based solely on the fact that the trial judge read the charging documents to the petitioner.[3] The Court of Appeals noted that the trial court asked Ahn, "if he 'understood the nature of the charge against [him], . . . the receipt of illegal gratuities, something of value to perform an official act or not.'" 231 F.3d at 34; App. 13. Ahn answered yes. The Court of Appeals then noted that Ahn was asked, "[Y]ou are charged . . . with receipt of illegal gratuities in that either you received directly or indirectly or demanded and/or agreed to receive, accept cash from two individuals because of official acts to be performed or not performed by you; is that true sir?" Ahn again answered "Yes, your Honor." *Id.*

This mechanistic approach was employed despite the court's recognition that "it appears possible that the

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[3]In *Henderson*, the petitioner argued that courts should examine the totality of the circumstances to determine "whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused. We do not disagree with the thrust of petitioner's argument. . . ." 426 U.S. at 644. The Court of Appeals here claimed to look to the totality of the circumstances, 231 F.3d at 33; App. 11, but relied instead on the trial court's reading of the charging papers.

prosecutor and the defense counsel agreed that the Government only needed to establish that Ahn received payments as a police officer." *Id.* It was employed despite the fact that the prosecutor's statements concerning what the parties understood about the gratuity statute were "inconclusive". *Id.*[4]App. 31.

The Court of Appeals also ignored other circumstances of the plea hearing bearing on Ahn's understanding of the charges against him. The Court ignored the fact that when he was first scheduled to plead guilty, Ahn could not go through with the agreement and changed his mind while in court. The Court also ignored the fact that when Ahn did finally plead guilty, the colloquy was very emotional and tortured. At several points the court had to suspend the proceeding while Ahn left to compose himself. App. 28-30. Ahn cried throughout the proceeding. App. 28. These facts may be read to indicate that Ahn was reluctant to endorse a plea which sounded worse than what the lawyers told him the crime meant.

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[4]Indeed, in its denial of Ahn's motion to withdraw his guilty plea, the district court never found that Ahn understood the charge. Rather, it indicated Ahn did not understand but that his misunderstanding did not matter:

> I recognize Mr. Chapman's statement. The government has discussed with counsel that he's not charging Mr. Ahn with a quid pro quo, but rather more a theory of his job which seems to imply that he was relying upon the laws that were interpreted at that time before Sun-Diamond.
>
> But I'm not bound by what the theory is that he had with counsel about this matter. I'm sure they discussed lots of matters.

App. 31.

The bottom line, however, is that despite hearing the court recite the statutory language, Ahn had been told what those words meant and unfortunately, that advice was incorrect.[5]

This Court should act to ensure that, as opposed to other situations in which a defendant claims his plea was involuntary, where the defendant is affirmatively misinformed about what conduct a criminal statute covers, his plea should rarely, if ever, be considered voluntary under the due process clause as interpreted by *McCarthy* and *Henderson*. At a minimum, reading the statutory language is an insufficient basis to support the plea because it cannot guard against the possibility that the plea was made "voluntarily and with an understanding of the nature of the charge *but without realizing that [the] conduct does not actually fall within the charge*." *McCarthy*, 394 U.S. at 467 (emphasis added).

[5]Reliance upon reading the statutory language also apparently flies in the face of the Court of Appeals own precedent. See *United States v. Ford*, 993 F.2d 249 (D.C. Cir. 1993) (defendant's acknowledgment of guilt in response to court's questions employing the statutory language insufficient to support guilty plea)

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated this 8TH day of February, 2001.
Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 6, 2000 Decided November 14, 2000
No. 99-3149

UNITED STATES OF AMERICA,
APPELLEE

V.

YONG HO AHN,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 98cr00060-01)

ENTERED: NOVEMBER 14, 2000

Jonathan Shapiro argued the cause and filed the briefs for appellant.

Elizabeth H. Danello, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Wilma A Lewis*, U.S. Attorney, *John R. Fisher, Thomas J. Tourish, Jr.*, and *Robert R. Chapman*, Assistant U.S. Attorneys.

Before: WILLIAMS, SENTELLE and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: Appellant Yong Ho Ahn, a Metropolitan Police officer; pleaded guilty to violating 18 U.S.C. § 201(c)(1)(B) by receiving illegal gratuities from massage parlors that were flagrantly violating local law. Ahn appeals from a district court judgment accepting his guilty plea and sentencing him to four months incarceration and two years supervised release. Appellant contends that in light of *United States v. Sun-Diamond Growers,* 526 U.S. 398 (1999), the district court erred in finding that his plea had a sufficient factual basis and that he understood the nature of the charges against him. Ahn also argues that the Government breached its duty of good faith and an implied promise of secrecy by leaking information to news media about his arrest, and submits that the district court erred in quashing a subpoena he sought in order to obtain the confidential sources of the reporters who broadcast the story. Finally, Ahn contends that the Government violated the plea agreement by making a witness available at the sentencing hearing and then questioning the witness, when it had expressly promised not to take a position on whether Ahn had obstructed justice.

For reasons more fully set out below, we hold that the district court did not err, and affirm Ahn's conviction and sentence.

I. BACKGROUND

In early September 1997, Lieutenant Yong Ho Ahn, a fifteen-year veteran of the Metropolitan Police Department of Washington, D.C., entered a massage parlor and informed

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

a person associated with the parlor a witness cooperating with the Metropolitan Police Department ("CW-1"), that it "was not properly licensed." As Ahn knew, the parlor violated local law by allowing its female employees to provide massages to male customers, see D.C. CODE § 47-2811, and by serving as a brothel, where male customers could purchase sexual acts from female employees, see *id.* § 22-2722. On September 3, 1997, CW-1 gave Lieutenant Ahn a controlled payment of $1,000. Within the following three months, CW-1 gave Ahn two additional payments-one for $500 and another for $1,500.

In early December 1997, Ahn visited a second massage parlor, which also allowed female employees to provide massages and sexual acts to male customers. At that parlor, Lieutenant Ahn informed another cooperating witness ("CW2") that the massage parlor "was not properly licensed." On December 23, 1997, CW-2 made a controlled payment of $3,000 to Ahn. The following month, Ahn received another controlled payment of $2,000 from CW-2.

On February 10, 1998, Lieutenant Ahn was arrested on a warrant charging him with receiving a bribe in violation of 18 U.S.C. § 201(b)(2)(C). After a failed plea attempt and a series of negotiations, he agreed to plead guilty to receiving an illegal gratuity under 18 U.S.C. § 201(c)(1)(B). As part of his plea agreement, Ahn agreed to cooperate with the Government "whenever, wherever and in whatever form" it deemed appropriate. In exchange, the Government agreed to inform the court of Ahn's cooperation and to abstain from taking a position at sentencing concerning whether Ahn obstructed justice.

On April 28, 1998, while the case was under seal and Ahn was secretly assisting the Government in a sting operation attempting to catch then-Mayor Marion Barry accepting a bribe, two televised news reports described Ahn's arrest. The sting, set for the following day, was quickly aborted. In light of the publicity surrounding his case, Ahn

filed a motion to withdraw his plea, contending that by leaking information about his case the Government had breached its implied promise to maintain the secrecy of his cooperation. The district court denied Ahn's motion, finding that the plea agreement contained no enforceable promise of secrecy and that, even if there had been such a promise, Ahn failed to carry his burden of proving that the Government breached it.

After the plea hearing, but before sentencing, the Supreme Court decided *United States v Sun-Diamond Growers*, 526 U.S. 398 (1999) which interpreted the illegal gratuity statute.

In light of the Court's interpretation, Ahn filed a second motion to withdraw its plea, this time arguing that the Government's factual proffer was insufficient to establish his guilt. Again, the district court denied his motion.

At Ahn's sentencing hearing, the district court considered allegations included in the presentence report that Ahn asked CW-1 to tell the FBI that the money he had taken had been returned. This allegation raised questions about whether Ahn's sentence should be enhanced for obstructing justice. At the hearing, the Government made a witness available to testify about the facts underlying the allegation. Then, at the court's direction, the Government questioned the witness. Ahn objected based on the Government's promise not to take a position on whether he had obstructed justice, but the court overruled him. Ultimately, after finding that Ahn had obstructed justice and grunting Ahn a downward departure for his substantial assistance, the court sentenced Ahn to four months incarceration and two years of supervised release and imposed a special assessment of $100.

On appeal, Alai contends that (1) his guilty plea was taken in violation of Rule 11 of the Federal Rules of Criminal Procedure; (2) the district court erred in finding that his plea agreement did not contain an implicit promise of secrecy and that the Government did not breach its duty of

good faith; (3) the district court improperly granted the two television reporters' motion to quash Ahn's subpoena; and (4) the Government breached the plea agreement by taking a position in favor of a sentence enhancement for Ahn's obstructing justice, We address each of these issues in turn.

II ANALYSIS

A. The *Sun-Diamond* Decision

A district court "may" grant a defendant's motion to withdraw a guilty plea "if the defendant shows any fair and just reason." FED. R. CRIM. P. 32(e). Although presentence withdrawal motions should be "liberally granted," they are "not granted as a matter of right." *United States v. Ford,* 993 F.2d 249, 251 (D.C. Cir. 1993); *United States v. Loughery*, 908 F.2d 1014,1017 (D.C. Cir. 1990).

On appeal, a district court's denial of a motion to withdraw will be vacated only if "the defendant can show an abuse of discretion." *Ford*, 993 F.2d at 251. In determining whether the trial court abused its discretion, this Court considers three factors: (1) whether the defendant "asserted a viable claim of innocence"; (2) whether the delay between the plea and the motion to withdraw "substantially prejudiced the Government's ability to prosecute the case"; and (3) "whether the guilty plea was somehow tainted." Id. (internal quotes omitted). Because Ahn does not claim to be innocent and the Government has not argued that the delay would prejudice its ability to prosecute Ahn, we focus our attention on the third factor.

If a guilty plea is tainted-that is, if it is "'entered unconstitutionally or contrary to Rule 11 procedures"'-a court's assessment of a motion to withdraw the plea is "very lenient,"' Id. (quoting *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975) (en banc). If the plea colloquy was not conducted in "substantial compliance" with Rule 11, then the

defendant should "'almost, always' be permitted to withdraw his plea." *Id.* (quoting *United States v. Abreu*, 964 F.2d 16, 18 (D.C. Cir. 1992) (per curiam)).

Ahn claims that his plea was tainted in two respects. First, he argues that the Government's proffer provided an insufficient factual basis for the illegal gratuity charge. Second, he contends that his plea was involuntary because he lacked an understanding of the nature of the charge against.

Each of *AIM* hinges on the meaning of the illegal gratuity statute, The statute makes it a crime for a public official to receive or accept "anything of value personally for or because of any official act performed or to be performed by such official...." 18 U.S.C. § 201(c)(1)(B). An official act is defined as "any decision or action on any ... matter ... which may at any time be pending ... in such officials official capacity, or in such official's place of trust. . . . " *Id.* § 201(a)(3).

Shortly after Ahn pleaded guilty, the Supreme Court decided *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999), which interpreted the illegal gratuity statute's "for or because of any official act" language. The *Sun-Diamond Court* held that an illegal gratuity could not be proved by merely demonstrating that a thing of value "was given because of the recipient's official position." *Id.* at 400. Rather, the Government must establish a link between the gratuity and "a specific 'official act' for or because of which it was given." *Id.* at 414; *accord United States v. Schaffer*, 183 F.3d 833, 844 (D.C. Cir. 1999). In other words, a violation requires that "some particular official act be identified and proved." *Sun-Diamond*, 526 U.S. at 406. Following *Sun-Diamond*, this Court held that an illegal gratuity "can take one of three forms": (1) a reward for past action, 2) an enticement to maintain a position already taken, or (3) an inducement to take or refirm Ahn from some future official action. *Schaffer*, 183 F.3d at 841-42.

1. Sufficiency of the Factual Proffer

Ahn argues that the Government failed to proffer any facts that would demonstrate a link between the payments he received and any official act. He suggests that, instead, the Governments proffer only establishes that the massage parlors paid him solely because of his position as a police lieutenant.

According to Rule 11, when considering a plea, the trial court must "mak[e] such inquiry as shall satisfy it that there is a factual basis for the plea." FED. R. CRIM. P. 11(f). To establish a satisfactory factual basis, the Government must proffer "'evidence from which a reasonable juror could conclude that the defendant was guilty as charged? " *In re Sealed Case,* 153 F.3d 759, 771 (D.C. Cir. 1998) (quoting *Ford*, 993 F.2d at 253). Accordingly, the trial court may draw reasonable inferences from the facts proffered by the Government. *See United States v. Graves,* 106 F.3d 342, 345 (10th Cir. 1997).

The Government's factual proffer established that Ahn went to the massage parlors to tell the cooperating witnesses that their parlors were not properly licensed. As a police officer, Lieutenant Ahn had a duty to report the licensing violations and to take "such immediate and proper police action as the circumstances may demand." METROPOLITAN POLICE DEP'T GEN. ORDER 401.4, Part 1, § D(2). The proffer explicitly described how Ahn accepted payments from two cooperating witnesses "associated with The Spa[s]" rather than reporting the violations. The proffer expressly defined "The Spa[s]" as "business[es] whereby male customers purchase massages from female spa workers ... [and] may also purchase sexual acts." In the proffer, the Government identified five different payments from the cooperating witnesses, who were, as the proffer makes clear, associated with "The Spa[s]," which by the proffer's own unambiguous definition were engaged in

illegal activity. Consequently, the only conclusion that can be drawn from the proffer is that while Lieutenant Ahn received payments from the cooperating witnesses, the massage parlors continued to engage in illegal conduct and Ahn failed to take any "immediate and proper police action."

Although Appellant is correct that the proffer does not explicitly state a link between the payments and an official act, it does provide sufficient "'evidence from which a reasonable juror could conclude that the defendant was guilty as charged?" *In re Sealed Case,* 153 F.3d at 771 (emphasis added) (quoting *Ford*, 993 F.2d at 253). A reasonable juror could interpret the facts proffered by the Government as demonstrating that the cooperating witnesses paid Ahn as a reward for his not reporting the parlors' violations when he *first* notified them that they were not properly licensed, as an enticement to continue failing to report them, and as an inducement for not reporting them in the future. Under a of these reasonable inferences, the Government has proffered a sufficient factual basis to establish the link between the payments and an identified official act, or in Lieutenant Ahn's case, an official failure to act. See *Sun-Diamond*, 526 U.S. at 414; *Schaffer,* 183 F.3d at 841-42.

We find instructive our recent decision in *In re Sealed Case,* 153 F.3d 759 (D.C. Cir. 1998). In that case, the defendant pleaded guilty to violating 18 U.S.C. § 924(c)(1), which establishes minimum sentences for anyone who "uses or carries a firearm" during or in relation to a drug trafficking crime. Before the defendant was sentenced, however, the Supreme Court held that to establish the "use" of a firearm the Government must prove that it was actively employed. *See Bailey v. United States,* 516 U.S. 137, 144 (1995). The *Sealed Case* defendant sought to withdraw his plea based on this holding, arguing that the Government's proffer had not established that he had used or carried a weapon. Nevertheless, the proffer did demonstrate that when police

officers told the defendant to show his hands, he moved them "away from his body and toward the corner," where the police found a gun moments later. *In re Sealed Case,* 153 F.3d at 771 We held that those facts were sufficient for a reasonable juror to find that the defendant had tossed away the gun and therefore was guilty of "carrying." *See id.* Likewise, in Ahn's case, the Government did not explicitly state that Ahn received the payments for or because of an official act, but the facts it proffered were sufficient for a reasonable juror to infer such a link.

In contrast, in cases in which courts have held that there was an insufficient factual basis for a defendants plea, the government has offered no evidence to support an element of the charge. For example, the defendant in United *States v. Ford* pleaded guilty to possessing a weapon while under indictment for a felony, *see* 18 U.S.C. § 922(n), and the government "omitted the fact that a gun was recovered from [the defendants] bedroom "the key fact necessary to establish that he possessed a gun. *Ford,* 993 F.2d at 253.

Similarly, in *United States v. Sawyer*, 74 F. Supp. 2d 88 (D. Mass. 1999), on which Appellant relies, the government's proffer was insufficient to establish a factual basis for a violation of a Massachusetts illegal gratuity statute similar to the one at issue here. [1] In Sawyer, the government only demonstrated that the defendant gave "free golf and other entertainment to Massachusetts's legislators."

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[1] In *Sawyer*, the defendant pleaded to guilty to mail fraud in violation of 18 U.S.C. §§ 1341, 1346. *See Sawyer*, 74 F. Supp. 2d at 92 & n.5. To establish federal mail fraud as alleged in that case, the prosecution Ahn required to prove that the defendant used the postal system to violate Massachusetts law The prosecution stated that the defendant had violated the state's illegal gratuity statute, which, like the federal statute, prohibits people from giving a public official-and a public official from receiving-anything of substantial value "for or because of any official act performed or to be performed." MASS. GEN. LAWS ch. 268A, § 3.

Id. at 93 n.6. The court properly ruled that the government failed to allege any link between the entertainment and an "identifiable, specific, official act." *Id.* at 103. More significantly, however, the government failed to identify any official act, instead wholly relying on the fact that gifts were given to state legislators.

Ahn argues that in his case, as in *Sawyer*, the Government believed that it could prosecute him based solely on his status as a police officer. Even if Ahn is correct, this belief is not fatal because the Government here, unlike the prosecution in *Sawyer*, proffered sufficient evidence linking the payments Ahn received to an official act. The record reveals that the district court substantially complied with the dictates of Rule 11(f), that the factual proffer provided sufficient to establish a violation of the illegal gratuity statute, and, therefore, that the court did not abuse its discretion in denying Ahn's motion to withdraw his guilty plea.

2. Voluntariness of the Plea

Ahn next contends that his plea was involuntary because he did not understand the nature of the charge against him. He suggests that, at the time of his plea, he understood that be was being charged with accepting payments because of his position as a police officer, not, as *Sun-Diamond* later required, because of any official act.

Before accepting a guilty plea, the trial court must engage in a colloquy with the defendant to determine that he understands "the nature of the charge to which the plea is offered," FED. R. CRIM. P. 11(c)(1), and, therefore, that it is voluntary, *see id.* 11(d). For a plea to be voluntary under the Constitution, a defendant must receive "'real notice of the true nature of the charge against.'" *United States v. Dewalt*, 92 F.3d 1209, 1211 (D.C. Cir. 1996) (quoting *Henderson v. Mor*gan, 426 U.S. 637, 645 (1976) (internal quotes omitted)).

Real notice is that which is "sufficient to give the defendant 'an understanding of the law in relation to the facts' of his case." *Id.* at 1212 (quoting *McCarthy v. United States,* 394 U.S. 459, 466 (1969)). In assessing whether the defendant has such an understanding, the record of the plea colloquy must, based on the totality of the circumstances, "'lead a reasonable person to believe that the defendant understood the nature of the charge.'" Id. (quoting *United States v. Frye,* 738 F.2d 196, 201 (7th Cir. 1984), and citing United *States v. Musa,* 946 F.2d 1297, 1304 (7th Cir. 1991)); *see also Roberson v. United States,* 901 F.2d 1475, 1477 (8th Cir. 1990) (explaining that a defendant is "entitled to relief if the totality of the circumstances indicates that he did not understand the nature of the charges to which he entered a plea of guilty").

Ahn's contention rests solely on the following statements made by the Government during the plea hearing:

> I would further proffer to the Court that [defense counsel] and I have had a number of discussions about the illegal gratuity and bribery statute. And we have discussed that under certain interpretations, it is unnecessary to show the payments were earmarked for a particular purpose, but rather payments can be made to an individual because of his capacity or his particular status within the Government.... Certainly in this case the Government has discussed with counsel is not charging Mr. Ahn with a quid pro quo, but rather more of a theory of his job.

Transcript of Plea Hearing, Mar. 11, 1998, at 26. Appellant argues that these statements suggest that Ahn understood that the Government only needed to prove that he accepted payments as a public official. When viewed in isolation, his

argument seems colorable. But when considered in light of the record of the plea hearing as a whole, it falls short.

Initially, in considering the Government's statement itself, it appears possible that the prosecutor and defense counsel agreed that the Government only needed to establish that Ahn received payments as a police officer. Yet, even the Governments statement is inconclusive. In the first part of its statement, the prosecution only said that "under certain interpretations" the Government did not need "to show the payments were earmarked for a particular purpose." It never said that in *this case* the Government need not show such a purpose. In fact, as explained above, the Government proffered sufficient facts to reasonably demonstrate a particular purpose that Ahn did nothing about the massage parlors' flagrant violations of the law.

The second half of the prosecution's statement is equally inconclusive. The Government correctly points out that it was "not charging Mr. Ahn with a quid pro quo" if it had been, then it would have been charging him under the bribery statute, a charge to which Ahn already refused to plea guilty. *Cf Sun-Diamond,* 526 U.S. at 405 (explaining that, in contrast with an illegal gratuity, "only a bribe requires proof of a quid pro *quo"); Schaffer,* 183 F.3d at 841 (noting that the bribery and illegal gratuity statutes differ because "bribery requires a *quid pro quo*"); *United States v. Tomblin,* 46 F.3d 1369, 1379 (5th Cir. 1995) Under the bribery statutes, the government must prove a quid pro quo."). Although it is plausible to read the "theory of the job" statement to mean that the Government was charging Ahn with receiving a payment because of his position, such a reading ignores the contrast the prosecution seemed to be drawing between "the illegal gratuity and bribe statute." In context, a reasonable person could have understood that the prosecution's reference to a "theory of the job" meant that the Government was charging Ahn for receiving payments that

were linked to his failure to uphold the duties of his job that is, his failure to report the licensing violations.

The critical inquiry is whether Ahn understood the nature of the charges against him. The record of the plea hearing reveals that a reasonable person would have believed that he did. Throughout the hearing, the court asked Ahn a series of questions focused on the nature of the crime. Significantly, at no point during this colloquy did the court or Ahn state that he was being charged merely for receiving payments because he was a police officer.

First, the district court asked whether Ahn "did either seek, or receive, or accept, or agree to receive something of value from two witnesses, who are cooperating with the Government ... *because of formal official acts* performed by you." Transcript of Plea Hearing, Mar. 11, 1998, at 14 (emphasis added). Moments later, after giving Ahn a chance to compose himself, the Judge again asked if he "understood the nature of the charge against [him], ... the receipt of illegal gratuities, *something of value to perform an official act or not*." Id. at 15 (emphasis added). Ahn responded, "I understand, Judge" *Id.*

Later in the colloquy, the Judge asked Ahn, "[Y]ou are charged ... with receipt of illegal gratuities in that either you received directly or indirectly or demanded and/or agreed to receive, accept cash from two individuals *because of official acts to be performed or not performed by you;* is that true, sir?" *Id.* at 23 (emphasis added) Ahn answered, "Yes, Your Honor." *Id.* at 24.

In each of these exchanges, the court spoke about Ahn's receiving payments for performing official acts, not for being a public actor, and in each exchange, Ahn replied that he understood. Based on this colloquy, a reasonable person could believe that Ahn understood the relationship between the law and the facts.

Cases in this Circuit that have held that a defendant did not understand the nature of the charges to which he

pleaded guilty were based on substantially more compelling circumstances than the instant case. In *Ford*, the district court did not "elaborate the charges beyond" asking the defendant whether he had seen and read the indictment, discussed it with his attorney, and understood it. *Ford*, 993 F.2d at 253. In addition, the court referred to the wrong charge twice and neglected to "inform[ ] the defendant of the material details of the charges against him." *Id.* at 254. In *United States v. Dewalt*, 92 F.3d 1209, 1212 (D.C. Cir. 1996), the court never mentioned that the defendant was pleading guilty to a charge concerning possession of a weapon. Furthermore, the court only asked whether the defendant had received a copy of and understood the indictment, not even asking whether he had read it *See id.; see also Henderson v. Morgan*, 426 U.S. 637, 642-43, 647 (1976) (holding that defendants plea to second degree murder charges was involuntary when he was a nineteen-year-old man with "substantially below average intelligence," the trial court had not discussed the elements of the crime, and the trial court had made no reference to the requirement that the defendant must have intended to cause the victim's death).

In light of the record before us, it reasonably appears that Ahn understood the nature of the charges against him and therefore that his plea was voluntary. Accordingly, we hold that the trial court did not abuse its discretion in denying Ahn's motion to withdraw his plea.

B. The Publicity of Ahn's Case

After two television stations broadcast reports detailing Ahn's arrest, Ahn moved to withdraw his plea, claiming that the Government had breached the plea agreement by leaking information to the reporters. The district court denied this motion, ruling that Ahn had not proved the Government expressly or impliedly had promised

to keep Ahn's cooperation secret, that Ahn failed to establish that the Government had leaked the information, and that any harm to Ahn was speculative. Ahn appeals from this denial.

We review a district court's factual determinations concerning a plea agreement, including its determination of whether a breach occurred, for clear error. *See United States v. Pollard*, 959 F.2d 1011, 1023-24 (D.C. Cir, 1992). In considering whether a plea agreement has been breached, we look to principles of contract law. *See United States v. Jones*, 58 F.3d 688, 691 (D.C. Cir. 1995). "Although reducing an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement creates a presumption that the agreement is integrated, the ultimate determination of integration is a question of fact to be determined in accordance with all relevant evidence." *Bowden v. United States*, 106 F.3d 433, 439-40 (D.C. Cir. 1997) (cites and internal quotes omitted). Likewise, as in all contracts, plea agreements are accompanied by "an implied obligation of good faith and fair dealing;" *Jones*, 58 F.3d at 692. In the context of plea agreements, the defendant maintains the burden of proving that die agreement has been breached. *See United States v. Kilroy*, 27 F.3d 679, 684 (D.C. Cir. 1994).

On appeal, Ahn argues that his plea agreement included an implied promise by the Government that it would maintain the secrecy of his arrest. According to Ahn, the Government breached this promise by leaking the circumstances of his arrest and plea to two television reporters. Ahn also alleges that the Government violated its duty of good faith through the leak.

It is clear from the record that Ahn desired to keep his plea and cooperation secret in order to shield himself, his family, and the Korean community. The Government's desire for secrecy is equally clear-secrecy was imperative for successfully executing the sting on then-Mayor Marion

Barry. Nevertheless, as the district court found, these desires do not constitute implied promises.

Ahn acknowledges that a promise of secrecy was not expressed in the plea agreement. The agreement did, however, include an integration clause, which specifically stated that no other agreements or promises existed between the parties. Standing alone, such a clause would be strong evidence that no implied promises existed after all, integration clauses "establish that the written plea bargain was 'adopted by the parties as a complete and exclusive statement of the terms of the agreement.'" *United States v. Fencers,* 792 F.2d 461, 464 (4th Cir. 1986) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 210 (1981)); *accord United States v. Hunt*, 205 F.3d 931, 935 (6th Cir. 2000) (holding that a merger clause "normally prevents a criminal defendant, who has entered into a plea agreement, from asserting that the government made oral promises to him not contained in the plea agreement itself"); *United States v. Alegria,* 192 F.3d 179, 185 (1st Cir. 1999) ("Where, as here, an unambiguous plea agreement contains an unqualified integration clause, it normally should be enforced according to its tenor."); *United States v. Doyle,* 981 F.2d 591, 594 n.3 (1st Cir. 1992) (explaining that this rule "has particular applicability when, as in this case, the plea agreement itself specifically states that 'there are no further or other agreements, either express or implied,' other than those explicitly set forth in the document").

But the integration clause does not stand alone; there is substantial evidence that the agreement did not contain an implied promise of secrecy, the most damning of which comes from the Appellant himself. In accepting the agreement, Ahn "reaffirm[ed] that absolutely no promises ... have been made or entered into in connection with my decision to plead guilty except those set forth in this plea agreement." At the plea hearing, Ahn again recognized that no promise had induced him to plead guilty other than those

promises made in the plea agreement. *See* Transcript of Plea, Mar. 11, 1998, at 22.

As a veteran of the police force represented by experienced defense counsel, Appellant was aware that he could have bargained for specific terms in the plea agreement. Yet he knew that secrecy was not an explicit term. In Fact he agreed to a merger clause stating that there were no other promises made. During the hearing on the withdrawal motion, there was no testimony from the law enforcement officers who investigated Ahn's crime that the Government would-or could-guarantee secrecy to him. *See, eg.,* Transcript of Proceedings on Defendant's Motion to Withdraw Guilty Plea, Oct. 6, 1998, at 110. Likewise, the FBI translator who spoke to Ahn when he was arrested did not know of any such promise. *See* Transcript of Proceedings on Defendant's Motion to Withdraw Guilty Plea, Oct. 8, 1998, at 164.

Based on this record, the district court found that the Government had not impliedly promised Ahn that it would guarantee his cooperation would be kept secret. Because the defendant failed to carry his burden of proof, these findings were not in clear error. Certainly, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York,* 404 U.S. 257, 262 (1971). Yet, "[w]hile the government must be held to the promises it made, it will not be bound to those it did not make. To do otherwise is to strip the bargaining process itself of meaning and content." *Fentress*, 792 F.2d at 464-65.

The district court likewise did not plainly err in finding that Ahn failed to carry his burden of proving that the Government caused the leak and consequently breached its obligation of good faith. All of the agents who had access to the information testified under oath or by affidavit that they did not divulge anything about Ahn's case to the media. Ahn

failed to present a single witness or any evidence to contradict the agents' sworn statements. As the district court noted, numerous people outside the prosecution team could have given the information to the television reporters, from police officers in Ahn's district who knew about the massage parlor investigation, to massage parlor operators who "knew about Mr. Ahn," Transcript of Proceedings on Defendant's Motion to Withdraw Guilty Plea, Oct. 6, 1998, at 124, to court personnel who had access to information about Ahn's case.

Ahn contends that only one way exists, for him to prove that the Government caused the leak and thereby breached its duty of good faith by subpoenaing the reporters to reveal their sources. When Ahn sought to subpoena the reporters, they filed a motion to quash arguing that reporters possess a qualified privilege not to disclose confidential sources. *Cf. Branzburg v. Hayes,* 408 U.S. 665 (1972) (addressing whether requiring reporters to testify before grand juries concerning their confidential sources' criminal conduct violates the First. Amendment). The district court found that the reporters' testimony was not "essential and crucial" to Ahn's case and was not relevant to determining Ahn's guilt or innocence. Therefore, the court concluded that Ahn had not demonstrated that the reporters' qualified privilege should be overcome. In granting the motion to quash, the district court did not focus on the government's duty of good faith, yet it was plainly aware of that duty. Because we agree that Ahn failed to carry his burden, we hold that the district court did not make an error of law or abuse its discretion in granting the reporters' motion.

C. The Sentencing Hearing

Ahn's final contention stems from his sentencing hearing, during which, he argues, the Government breached its plea agreement. According to the presentence report Ahn

approached CW-1 and asked her to tell the FBI that Ahn had returned the payments he had received. As a result, Ahn faced the possibility of having his sentence enhanced for obstructing justice. *See* UNITED STATES SENTENCING GUIDELINES § 3(c)1.1.

In the plea agreement, the Government had promised Ahn that it would not take a position on whether he should receive an obstruction enhancement. At the sentencing hearing, Appellant's counsel pointed to this provision of the agreement, suggesting that the court would have no evidence on which to base such an enhancement. The Government responded by informing the court that it could "make a case agent available to the Court should the Court want to hear that agent" testify. The court assented, stating that it wanted to "hear from the agent." The Government then asked, "Does the Court wish the prosecutor to inquire?" The court did, so the Government questioned the agent about the allegations in the presentence report.

Appellant now argues that the Government breached the plea agreement by taking a position on the obstruction enhancement. According to Ahn, the Government, while not explicitly advocating an enhancement, effectively took a position by not only questioning the agent, but "rehearsing" that testimony before the hearing. This argument is unpersuasive.

Determining whether a plea agreement was breached presents a mixed question of law and fact in which the factual aspects usually predominate." *Pollard*, 959 F.2d at 1023. Accordingly, we review the district court's legal conclusions de novo and its factual findings for clear error. *See id.* Of course, the district court is "in the best position to determine whether the government presented an argument that, perhaps subtly, exceeded the bounds of the agreement." Id. Therefore, in cases such as the one before us we employ a more deferential standard of review.

At Ahn's sentencing hearing, the Government had a duty to provide relevant information about whether Ahn obstructed justice, even though it had agreed not to take a stand on whether he should receive a sentence enhancement. See *United States v. Mata-Grullon*, 887 F.2d 23, 24 (1st Cir. 1989) (per curiam) ("[T]he government must bring all relevant facts to the judge's attention."); *United States v. Perrera*, 842 F.2d 73, 75 (4th Cir. 1988) (explaining that the Government has "a duty to bring all relevant information ... to the court's attention at the time of sentencing"). Under the circumstances, we hold the Government acted appropriately in informing the court that a witness was available to recount the facts underlying the presentence report. *Cf. United States v.Griffin,* 816 F.2d 1(D.C. Cir. 1987)

Furthermore, the prosecution did not violate the plea agreement by questioning the witness as instructed by the court. *Cf. United States v. Goodman*, 165 F.3d 169, 173 (2d Cir. 1999). The court specifically directed the Government to "just ask [the witness] the basic questions." By limiting its questions to factual material, the Government merely facilitated the agent's providing the court with relevant background on whether Ahn obstructed justice. As the court explained at the sentencing hearing, the prosecution's questioning simply allowed the court "to find out what happened."

The court undoubtedly understood the nature and purpose of this questioning. Throughout the hearing, it repeatedly recognized that the Government was taking no position on the obstruction enhancement. *See, eg.*, Transcript of Sentencing, Nov. 16, 1999, Record Material for Appellee at 7 (recognizing that the Government "agreed not to take a position"); *id*, at 12 ("The Government takes no position."); *id.* at 13 ("[Y]ou're [i.e., the Government] not taking a position."). Additionally, the court unambiguously declared that whether Ahn's sentence would be enhanced was "strictly up to the Court to decide." *Id.* at 12; *see also id.* at

19 (explaining that the court would "make an independent judgment" on the enhancement). Like the trial court in *United States v. Griffin*, "the District Court was clearly informed of the terms of the plea agreement and of what the government's recommendation on penalty was to be." *Griffin*, 816 F.2d at 7. Accordingly, the court did not clearly err in allowing the Government to make a witness available to recount the facts of Ahn's obstruction, and the Government did not breach the plea agreement by questioning that witness.

III. CONCLUSION

For the reasons stated above, the district court's judgment is

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-3149 **September Term, 2000**
98cr00060-01

Filed On

United States Court of Appeals
For District of Columbia Circuit

FILED JAN 11 2001

CLERK

United States of America,
Appellee,

V.

Yong Ho Ahn,
Appellant.

BEFORE: Edwards, Chief Judge; Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

FILED: JANUARY 11, 2001
ENTERED: JANUARY 11, 2001

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY /s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Garland did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-3149 **September Term, 2000**
98cr00060-01

United States of America,
Appellee,

V.

Yong Ho Ahn,
Appellant.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE THOMAS HOGAN

ENTERED: OCTOBER 16, 1998

According to the Court now, the limited appearance of Nina Ginsberg from the firm of DiMuro, Ginsberg & Lieberman in Alexandria, Virginia, as counsel in connection with Mr. Ahn's guilty plea, the appearance of Mr. Shapiro and Mr. Smith in this court in other matters and his first attempt to withdraw his plea because of the alleged breach of the Government in leaking details of the plea which were supposed to remain confidential and he moved to withdrew his plea of Santa Bello [ph] versus New York. After a lengthy, three-day evidentiary hearing, the Court denied that motion to withdraw that plea.

This second motion withdraws the plea about 18 months or more after the plea was made, a basis on the new law, on the interpretation of the law, perhaps, of Supreme Court of the United States versus Sun-Diamond Growers of California, 119 S. Ct. 1402, a 1999 case.

The Court there addressed the issue that really controls here of whether 18 U.S.C. 201(c)(1)(A), which addresses the giving of illegal gratuities, require the Government to prove a nexus between the gratuity and the official act the giver wants the official to perform, and the Court held, quote, "The insistence upon an official act carefully defined seems pregnant with the requirement that some particular official act be identified and proved," end quote. That's at 1407.

And thereafter they said that, 1411, what was required basically is, quote, "A direct link between a thing of value conferred upon a public official, a specific official act for or because of which it was given," and they reversed a conviction because they said the Court's instructions did not comply with this interpretation of the statute.

So the Defendant claims in this case Sun-Diamond presents a change or development in the law that removes his conduct from the statute as referred to which addresses that--and that's 201(c)(1)(b) of Title 18--which addresses a taking of an illegal gratuity because the factual proffer that Mr. Ahn admitted to was insufficient to sustain a charge.

Now, the Government has argued that if you look at all the information in the case including the--the superseding Information filed herein, which was filed on March 11, '98, in the case that at the time he was a police officer in D.C., and then from September of '97 through January of '98 that he did accept and also it gives a demand of seeking but also to accept, he agreed to receive, something of value from two witnesses, cash, because of an official act performed or to be performed by him. That's under 1(b) of the statute, Title 18.

The Government insists that taking that in conjunction with the proffer establishes a sufficient nexus, a direct link between the thing of value conferred upon Mr. Ahn as a public official, a civic official act for which it was given, and an act is either because he didn't act when he

should have or he failed to act or refrained from acting when he should have.

Now, the factual proffer, which is Exhibit C in the Government's brief, superseding Information was B, the factual proffer indicates--this was the written proffer and I'll go to the oral one in a minute--indicates that Mr. Ahn was a public official. There's no question about that.

That there are massage parlors in the District Of Columbia that employed female spa workers and males purchased massages from them and also may purchase sexual acts for extra fees from the workers.

The offense indicated, again, from September '97 to '98 approximately that Ahn entered the spa and spoke with a person associated with the spa, identified as Cooperating Witness No. 1, and told her, or whoever it was, Cooperating Witness No. 1, that the spa was not properly licensed in early September.

On September 3. obviously very early in September still, so it had to be within a day or two, CW, meaning Confidential Witness, CW No. 1 made a controlled--that is, the Government was involved in this --$1,000 cash payment to Mr. Ahn here in the District of Columbia. So that is within a very close time frame from the time he walked in and said that you are not properly licensed.

On November 11, sometime thereafter therefore, over two months later, there was a $500 controlled payment made by CW-1, and about a week later, November 21, ten days later, a second--a third, $1,500 payment was made to Mr. Ahn all in Washington, D.C.

So a total of $3,000 was paid to Mr. Ahn after he had gone in in early September. Starting on September 3 payments were made for a total of $3,000 and said to the 2 person, "You're not properly license." That's all we have 3 in this report on the written proffer.

In approximately early December of '97, Ahn entered a spa and spoke with a person associated with the spa,

Cooperating Witness No. 2 called CW-2, and again told CW-2 the spa was not properly licensed. This was early December.

On December 23, therefore sometime later, almost three weeks perhaps later, CW-2 provided Ahn with a controlled $3,000 cash payment, and then about three weeks later, January 15, '98, made a second controlled $2,000 cash payment, so Mr. Ahn received $8,000 after telling the spa, control witnesses, they were not properly licensed. The spa was not properly licensed.

And according to the factual proffer, written factual proffer, in the taking of the plea in the oral colloquy of the Court--it's a long colloquy because Mr, Ahn's concerns or emotional state was such the Court took a 'recess of substantial time to make sure Mr. Ahn wanted to go forward with this plea. Mr. Shapiro was representing Mr. Ahn. He had not made a formal appearance, although he said he would do that shortly, and Mr. Smith was the court appointed attorney of Mr. Ahn, and he would move Mr. Shapiro's admission because Mr. Shapiro's from Alexandria, and I said, "I want to make sure Lieutenant Ahn's satisfied counsel in any event. Let the record reflect both Mr. Shapiro--Mr. Shapiro sitting is in the courtroom with Lieutenant Ahn."

And Mr. Smith said, "The actual plea agreement that has been signed was gone over with Mr. Shapiro, and of course you can inquire of him about that. I am privy to the general arrangements, and of course I have been following the case. Mr. Shapiro has kept me informed of what's going on."

And I said, "I'll question Lieutenant Ahn carefully about it and make sure he's satisfied with it," referring to the plea agreement, "and he has received counseling from either yourself or Mr. Shapiro," and I asked if he received counseling and assistance. Mr. Smith said he received many hours of counseling.

Then I went through all the standard Rule 11 plea colloquy of Mr. Ahn, and Mr. Ahn was obviously, as I said before, in a disturbed state. He had been crying during the taking of the plea, so we took recesses to allow him to compose himself,

And there on page 14 of the transcript, beginning with page 11, I read to him the charge he's pleading to, which "I just reviewed for the record a minute ago, that he accepted something of value or sought it or received it or agreed to receive something of value from two witnesses cooperating with the Government and that was cash, either because of formal official acts performed by you. We'll hear more about it from the Government to flush that out." Flesh it out. It should have been "flesh."

And then I asked if he needed more time. He was crying again and we took a recess for a minute again. And then I reviewed with him and asked if he understood the nature of the charge which he's going to plead guilty, "the receipt of illegal gratuities, something of value, perform an official act or not. Something that you are not supposed to do as a police officer," and he answered, "Yes, I understand, Judge."

I asked if he'd like to take another break and he said he wanted to continue. I then went through the plea letter with him in detail. I went through the last page in particular with him where he signed it saying he understood it and agreed to it, and tended to be legally bound by it, discussed it with his counsel. He was not under the influence of anything. He had the ability to understand the agreement, and that there were no other promises to accept the conditions except those previously introduced. He then signed it.

Now, again, I said to him on page--I referred to this earlier--23, "You are charged in the Information, and the Government will flesh this out for a minute for the record, but you're charged, as I said before, September 3 and

November 15 in the District of Columbia as a public official with receipt of illegal gratuities in that either you received directly or indirectly or demanded and/or agreed to receive cash, accept cash, from two individuals because they were official acts to be performed or not performed by you; is that true, Sir?"

And he paused and he had a request, "Your Honor, if I relinquish--"

And I said to him, "You have to, on the record, either admit it is true that you did this or not. If I accept the plea, you have to admit to it. I can't accept it otherwise. It is not an Alford plea. It's not any other type of arrangement."

And he said, "Yes, Your Honor."

I said, "Have the Government review the facts that establish that you committed these offenses, and see if you agree with that statement by the Government or not as to what happened."

The Government filed their statement and a proffer of facts and then reviewed it as I've already done here orally. I've already reviewed that during argument here today what the Government orally said.

And then Mr. Chapman concluded that I'd asked him earlier about that "I would further proffer to the Court that Mr. Smith and I had a number of discussions about the illegal gratuity and bribery statute, and we have discussed that under certain interpretations it is unnecessary to show the payments were earmarked for a particular purpose, but rather payments can be made to an individual because of his capacity or his particular status within the Government and that concludes the Government's proffer at this time, Your Honor."

I answered, "All right, and the type of illegal gratuity is being used by independent counsel in various actions." He referred to a case that I had earlier. "The HUD cases have a lot of illegal gratuity, not a lot of action like the Espy case, but it favored them in anticipation."

Mr. Chapman said, "Yes. Certainly in this case the Government has discussed with counsel is not charging Mr. Ahn with a quid pro quo, but rather more of a theory of his job."

And I asked Mr. Ahn to come back to the podium. I said, "Have you heard the proffer of facts in this case if the case went to trial against you, that is the payments from the cooperating witnesses to you in September and November of '97."

"Do you agree with what the Government says essentially happened?"

The Defendant said, "This is difficult for me. I'm sorry, Your Honor." He was still upset. He was crying.

I said, "Take your time. It's a very serious step."

The Defendant talked about his family and about taking this plea and how difficult it was. I indicated, "The Government said they had evidence of two controlled or more-then two controlled, that is, several controlled payments to you, that are illegal gratuities from a massage parlor. I want to make sure you want to go through with this because once you go through with it, it's very difficult to withdraw."

I said, "You have two experienced counsel. I'll not make any suggestion to you one way or another about it, so if you wish me to go forward, I'm prepared to enter a judgment of guilty against you because you admitted that you were guilty as charged. But I don't want to take that final step unless you are satisfied."

I told him he could talk to his counsel if he wanted some time, so I took another recess so he could do that. I asked him if he's ready to go forward. Again, I told him, "If I accept your guilty plea, it's very hard to withdraw it."

He said he wanted to go forward with the guilty plea. I found him guilty of receipt of illegal gratuities in violation of 18 U.S.C. 201(c)(b).

All **right. So as Ms. Ginsberg said, it seems to the Court after that full review, you get down to whether or not the proffer and then his admissions and the Information that I read to him and he understood what he was pleading to, and the questions that I asked him, indicating where he said yes, constitutes sufficient factual basis in which to accept an illegal gratuity plea of guilty under Sun-Diamond.

While I'm not as sanguine as the Government is that this is a clear case that Mr. Ahn, under Sun-Diamond, has been shown to have a direct link between a thing of value conferred upon a public official and a specific official act for or because of which it was given and that as to the factual proffer and exchange that followed between myself and the prosecutor and myself and Mr. Ahn, I am satisfied there is a sufficient basis under Sun-Diamond as interpreted, by Schaffer in our Circuit--really the only post-Sun-Diamond case we have that there is the kind of evidence necessary to establish the nexus between the gratuity and the official act--and for that reason I'm going to deny the request to withdraw the guilty plea once again, and this is my rational at this time.

I recognize Mr. Chapman's statement. The Government has discussed with counsel that he's not charging Mr. Ahn with a quid pro quo, but rather more a theory of his job which seems to imply that he was relying upon the laws that were interpreted at that time before Sun-Diamond.

But I'm not bound by the Government's statement what the theory is that he had with counsel about this matter. I'm sure they discussed a lot of matters. It seems to me in evaluating this motion to withdraw I have to proceed under Rule 32(e) and liberally apply it for any fair and just reason.

United States versus Ford in our Circuit, 993 F.2d, at 249 and 251, indicates I have to consider one, where the Defendant has a sort of viable claim of innocence, which would really go to the Sun-Diamond issue in this case, and since there was no basis for the plea, it would be innocent

and according to the Defendant's theory because there's not sufficient evidence to proffer whether he was guilty.

Two, whether the delay between the plea and the motion is prejudicial to the Government's ability to prosecute the case, and as I said, there are some ex parte filings that I will address in a minute, and three, whether the guilty plea is somehow tainted, Well, under three, there's no taint to the plea. I've gone through that already in one guilty plea motion to withdraw and it was perfectly and validly taken under the general rules of criminal procedure.

The issue really is whether you serve a viable claim of innocence in the sense that legally there is not a certain basis to accept the plea. He has not come before me and said I'm innocent of these charges because there's. newly discovered evidence and/or anything of that such, but he's saying I'm innocent in a sense that Sun-Diamond has established new requirements that the Government did not prove when I took the guilty plea--when I accepted the guilty plea, and secondly, about the delay as prejudicial to the Government, and I'll address that later as I said.

So Sun-Diamond may provide, according to the Defendant, should provide a fair and just reason to withdraw his guilty plea because he pled to actions that do not constitute a crime under the interpretation of the answer by the Defendant, referring to the quid pro quo statement of the prosecutor.

The Court's review of the written and oral proffer, as I did at this time, was purposely done to show that there was sufficient evidence to accept this guilty plea under Sun-Diamond interpreted by Schaffer for these reasons: One, is that there was clear evidence in the guilty plea in Mr. Ahn's admission when I asked him about the Information that the charge was that he received illegal gratuities because he agreed to accept or did accept cash from two individuals because of his official acts to be performed by him or not performed by him, is that true?

After a colloquy the Defendant said, "Yes, Your Honor," and additionally, then, the proffer of the Government establishing his visits to the spas, his telling the spa individuals that were not properly licensed and then on the first occasion, within a day or two, coming immediately back and accepting cash payments on the second occasion for a period of weeks, accepting cash payments in both cases, for a total of over $2,000--over $8,000 of cash payments.

There is no statement in the proffer that that was done so that he would not report them to X, Y, Z department of enforcement so their license would be lifted or he did not write them up for prostitution because of these payments, so there's no direct specific act set forth in the factual proffer.

However, if you look at the Schaffer case, which was reported now just at 1999 West Law 518840--it's a D.C. Circuit, July 23, 1999, case--it discussed the kind of evidence that was established in nexus between the gratuity and the official act, and that's what we have to look at here. One, they said there are three forms, and the first is the form of reward for past action where he performed an official act, and it's referenced to the Campbell case here in the District of Columbia where a judge accepted something of value after performing official acts.

Here the Government argues that is substantiated by Mr. Ahn receiving cash from the spa representative as a reward for not taking enforcement action when he told them they were not properly licensed. He tells the spa owners, You're not properly licensed. I'll have to close you down and what happens, a day or two later they start paying him money, and the second occasion, some time, weeks later, he appeared before them as a police officer. He admitted he appeared in a police outfit. He admitted he was taking money from them, and he admitted he told them they are not properly licensed.

The Government says it also fits in the second theory of Schaffer. Schaffer's second theory is the gratuity can be

intended to entice a public official that's already staked out a position favorable to the giver to maintain that position, and that is where the spa owners were told they're not licensed properly. They're not arrested or charged with a violation. In other words, he staked out a position of nonenforcement in favor of those spa owners and was paid to maintain that position.

I come in as a police officer and say to the person, You're not licensed properly, and it's obvious then to that person for that remark--it's common sense--believes that they have a problem, and then I pay them money and nothing happens. That seems to me that he has staked out a position of nonenforcement.

Finally, the Government argues the facts to the third form discussed in Schaffer by inducing Ahn to shy away from some future official acts, this is taking enforcement action. And that is again, he comes in. He sees that they're not properly licensed. He tells them that. He's a policeman in his official capacity and they immediately, in the first case, start paying him money--a day or two, in the second case. A week or two, start paying him money and he then does not take any enforcement action against them of whatever type it would be, whether it was prostitution or reporting an official.

The only concern the Court had in reviewing this, whether or not in the factual proffer there would have to have been a specific official act that he agreed he did not do for taking this money, and that is, should the Government have the proffer, Mr. Ahn agrees he did not thereafter go to the Department of Licensing Enforcement and report them. He agrees that he did not file a criminal complaint of prostitution against them when he could have done so.

I do not find it necessary under the Schaffer case. It seems to me that the language of the Supreme Court when interpreted by Schaffer what an illegal gratuity is, is a hope or expectation a public official will be swayed by the

payment not to do something or given to a thank you for doing something or not doing something he should have done earlier, basically. I think the factors set forth by the Government showing how this case fits under Schaffer satisfy the requirements of Sun-Diamond.

We have to realize that it took the plea of Mr. Ahn to assume the natural and probable consequences of the acts that he did, and he admitted that he took money and he admitted that he told them that you're not properly licensed and admitted there was no action taken thereafter, no facts before the Court that he took any action against them after he informed them they were operating illegally. That is, they were improperly licensed.

Additionally, I read to him the Information that had said to him that he took money in exchange for not doing his official act which he should have done, and he agreed to that, and it seems to the Court that Sun-Diamond does not require more. That is, that the Government have to put in that he admitted he did not file a complaint for prostitution when he should have or that he did not report to other authorities about having an improper license when he should have in exchange for payment of the gratuity. It seems at that point you're talking as to bribery of a specific duty. It's not any longer a gratuity. So I'm going to deny the motion for those reasons.

Additionally, I have reviewed the Government's ex parte motion. I'm leery of ex parte motions, but essentially I'm doing it in this case as blamed in the act contained in that as to prejudice to the Government, which is the second prong under the Ford case in consideration of whether a Defendant should be allowed to withdraw a guilty plea when the motion's prejudicial to the Government's ability to prosecute the case.

The Government has shown certain prejudice that would arise if Mr. Ahn is allowed to withdraw his guilty plea by the ex parte filing which remains part of the record for

review by a higher court for this circuit and that certain witnesses would be unavailable, both government employees as well as nongovernment employees, that the preparation of the case is substantially hampered by various factors set forth in the ex parte filing involving grand jury matters, preparation of transcripts, and if the case goes forward against Mr. Ahn to trial, the revealing of an essential witness who is still in an undercover capacity, ongoing serious criminal investigations here in this city, which would compromise that investigation. All those go to prejudice of the Government under the second prong of Ford if the case had to go forward, but I'm not relying upon that as a basis solely for denying the withdrawal of the guilty plea.

My basis is as found on the Sun-Diamond issues, the colloquy the Court had with Mr. Ahn, and the factual proffer by the Government that Mr. Ahn agreed to being sufficient as I find it under the Schaffer case to satisfy the requirements that there was a sufficient nexus between illegal gratuity and the failure to take action by Mr. Ahn when he received those illegal gratuities.

While I'm sensitive to prejudice to the Government and potentially could be the grounds for refusing to grant the--withdraw the guilty plea, I did not find it necessary at this time to make that the basis of the ruling that I needed from the Government to satisfy the Sun-Diamond nexus requirement. So I'm going to deny the guilty plea at this time, withdraw this motion. Mr. Ahn will have to go forward with the presentence report at this time to get it done and then we can move forward.

18 U.S.C. Section 201. Bribery of public officials and witnesses

* * *

(c) Whoever -

(1) otherwise than as provided by law for the proper discharge of official duty -

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom; shall be fined under this title or imprisoned for not more than two years, or both.